usurping the powers of the court. Considering this act of the respondent and then her non-disclosure to the court that the first caveat had been removed, I do not think she has any ground, equitable or legal, to maintain the caveat. Further, the land, by reason of her own act in having transferred it, has lost its original user, as it is being developed into a housing estate. The applicant must have expended substantial sums for the development. Regard must be had to this and to public interest as well. But in spite of all this, I would not say that the respondent is without remedy. If she could establish her claim, damages should be appropriate remedy in the circumstances of the case."

I was full in agreement with the interpretation of the law by my learned brothers and had no hesitation in following it. I therefore ordered that the application be allowed with costs and the said caveat be removed forthwith.

Application allowed.

Solicitors: *Lim Kean Siew & Co.; Presgrave & Matthews.*

IN RE THE ESTATE OF TUNKU MOHAMED JEWA IBNI ALMARHUM SULTAN ABDUL HAMID, DECEASED TUNKU ISMAIL BIN TUNKU MOHAMED JEWA & ANOR. v. TUNKU BAHAROM BIN TUNKU MOHAMED JEWA & ORS.

[O.C.J. (Syed Agil Barakbah J.) September 24, 1981]

[Alor Star — Originating Summons No. 125 of 1981]

Probate and Administration — Application for sale of land belonging to estate — Conditional contract for sale — Existence of better offers after conditional contract — Sale by tender.

In this case the deceased left a number of landed properties. The plaintiffs, the administrators of the estate, applied for leave to sell the properties. A valuation report was obtained in respect of the properties. The plaintiffs applied for leave to sell a piece of land comprised in SPK No. 20740, Lot 2414, Kota Setar for the sum of $830,000 in accordance with a conditional contract made with intending purchasers. This agreed price exceeded the valuation price by $220,000.00. The plaintiffs also applied for leave to sell the other properties by tender based on the minimum prices according to the valuation report. One of the beneficiaries of the estate, Tunku Maryam, objected to the sale under the conditional contract, as she showed there were better offers for the land. She however consented to the sale of the other lands.

Held: (1) as the parties had consented, an order would be made for the sale of all the other properties with the exception of the land in dispute by way of tender under Order 31 rule 2 of the Rules of the High Court, 1980;

(2) the plaintiffs were not bound by the agreement, executed with the purchasers unless leave was granted by the court. In this case as there were better offers for the land the conditional contract should not be approved, but the land should be sold by way of tender in order to obtain the best price possible.

Cases referred to:-

(1) *Che Ah and Che Yang Kelsom* v. *Che Ahmad* [1941] M.L.J. 126.

(2) *Haji Saud* v. *Haji Ahmad & Anor.* [1957] M.L.J. 50.

(3) *Ng Lit Cheng* v. *Felixia Varnakulasinghe & Anor.* [1977] 2 M.L.J. 249.

(4) *Buttle & Ors.* v. *Saunders & Anor.* [1950] 2 All E.R. 193.

(5) *In re Thomas, Bartley* v. *Thomas* [1911] W.N. 143.

ORIGINATING SUMMONS.

Ng Yoke Mui for the plaintiffs.

S. Visvanathan for the objector.

G. Sutherson for the purchasers.

Syed Agil Barakbah J.: This is an originating summons filed by the two plaintiffs in their capacity as the administrators of the estate above-named. They are seeking leave of this court for:

(i) liberty to sell and transfer all those pieces of land belonging to the estate as described in section 1 of Schedule 1 annexed to the affidavit for the minimum prices according to the Valuation Report by qualified surveyors as stated in section 2 of the said Schedule by way of private treaty, tender or auction;

(ii) that the profits of the sale of the aforesaid properties be utilised to discharge all liabilities of the estate and the balance thereof be distributed amongst all the beneficiaries as named in Schedule 2 thereof in their appropriate shares according to the Muslim Law of distribution; and

(iii) that the costs of the summons be paid out of the assets of the estate.

All the beneficiaries have filed their respective letters of consent with the exception of Beneficiary No. 14 i.e. Tunku Maryam binte Y.T.M. Tunku Mohd. Jewa Haji (hereinafter called the "objector") who objected to the application in particular to the proposed sale of land comprised in SPK No. 20740, Lot 2414, Mukim of Kota Setar (hereinafter called "the land in dispute"). Her main ground was that the land in dispute is worth considerably more than $590,000 as valued in the Valuation Report and that the other properties should not also be sold for the minimum reserve prices. At the first hearing in my chambers on September 5, 1981 both plaintiffs were represented by Miss Ng Yoke Mui, the objector was represented by Mr. Visvanathan and Mr. Suthersan appeared on watching brief on behalf of the purchasers.

The facts and surrounding circumstances of the case are that the deceased died leaving 19 beneficiaries viz. his surviving widow, sons and daughters who are entitled to his estate under the Muslim law according to their respective shares as stated by the letter of the Kadi Besar Negeri Kedah. (Ex. J, attached to plaintiff's affidavit dated July 19, 1981, Encl. 6). On October 25, 1980 the widow renounced all her shares, rights and interests in the estate of the deceased in favour of the objector (Ex. B attached to Encl. 1 of the plaintiff's affidavit dated March 7, 1981). The latter is therefore entitled to the largest share among all the beneficiaries.

The deceased died leaving properties comprising mainly of 13 pieces of land, cash deposit in banks and one motorcar as assets. The liabilities comprise of funeral expenses and of gifts-inter-vivos of some lands made in his lifetime. These are shown in Ex. C attached to Encl. 1 issued by the Pemungut Hasil Pesaka Tanah Melayu. The estate duty has been assessed at $240,053.15 of which the sum of $188,174.80 has been paid towards partial discharge, leaving a balance of $90,503.16 still owing (Ex. D attached to Encl. 1). The intention of the plaintiffs in making the present application to sell the properties is with a view to settling that balance and all other liabilities incurred on behalf of the estate including the annual

premium of $10,000 to Messrs. Norwich Winterther Insurance (Malaysia) Sdn. Bhd. who has stood surety under the Administration Bond and thereafter to distribute the balance among the beneficiaries. As it is there is no liquid cash in hand with the administrators to meet any of the above commitments.

Out of the assets left by the deceased the land in dispute is the only one on which there has been offers to purchase. The land with buildings thereon is valued at $590,000 (Ex. F attached to Encl. 1). According to the objector's affidavit filed on September 6, 1981 she made an offer through her solicitors Syarikat Visva in a letter dated January 21, 1981 addressed to the plaintiff's solicitors Messrs. Yaacob & Ismail to buy the land in dispute at $590,000 with a request to keep her further informed of any higher offers (Ex. TM2 attached to Encl. 25). The latter sent a reply dated January 28, 1981 that the plaintiffs had found a purchaser for the land in dispute for a price of $830,000 and requested the objector to reply immediately if she was desirous of paying a higher price. As a result the latter through her solicitors replied on February 11, 1981 that she was prepared to pay a sum of $850,000 for the purchase of the said land and upon acceptance of the same was willing to pay a substantial sum as deposit if necessary in order to meet the payment of estate duty and expedite distribution of the estate. A reply was sent by the plaintiff's solicitors on February 21, 1981 informing the objector that her offer was under consideration, at the same time requesting her to return the letter of consent which has been sent to her earlier, on or before February 28, 1981, failing which the plaintiffs would proceed with their summons in court without further delay (See Ex. TM4 and TM5 attached to Encl. 25). However on February 25, 1981 the plaintiffs as the administrators to the estate of the deceased executed a conditional sale and purchase agreement for the sale of the land in dispute with Tan See Chye and Ng Lim Yeow @ Ng Ah Kan (hereinafter called the "purchasers") for a total consideration of $830,000 subject to and conditional upon the approval of the court. (Ex. L attached to Encl. 6). The reasons given for this agreement are that it is a conditional contract subject to court's approval, that the agreed price which exceeds the valuation price by $220,000 is fair and reasonable at the date of the execution, and that the applicants did not believe the offer made by the objector was *bona fide* on the ground that, to the best of their knowledge, she has no assets whatsoever and could not obtain any loan in the light of the tight credit squeeze by all banks and other financial institutions. Furthermore, apart from the objector's offer, the offer by the purchasers was the only one they had received during the period of 8 months after the date of extraction of the Letters of Administration and the purchasers were willing to pay a sum of $83,000 upon execution which could be utilised for paying estate duty and avoid accumulating interest thereon (See Encl. 6).

On the other hand the grounds given by the objector in her affidavit (Encl. 25) for withholding the letter of consent for the sale of the estate properties are that the plaintiffs have been evasive and not candid in their approach in that they sent the letter of consent for execution to her directly instead of sending it through her solicitors without attaching any schedule of properties and the schedule subsequently sent to her solicitors failed to state the minimum reserve sale prices against the respective properties. Further the originating summons and supporting affidavit (Encl. 1 & 2) and the Supplementary Affidavit of the plaintiff (Encl. 6) were only served on her solicitors on August 20, 1981. Having been served with these relevant documents including the Valuation Report she is now not objecting to the sale of the remaining properties of the estate basing on the minimum sale prices disclosed thereto, but retains her objection to the sale of the land in dispute to the purchasers.

When hearing resumed on September 12, 1981 the parties consented to an order by court for the sale of all other properties with the exception of the land in dispute by way of tender under Order 31 rule (2) R.H.C. 1980.

It must be mentioned that in their further affidavit (Encl. 6) the plaintiffs at paragraph 11 thereof stated that subsequent to the execution of the agreement with the purchasers they received a higher offer from one Mr. Tan Yin Wa of 917 Jalan Sultan Badlishah, Alor Setar for the purchase of the land in dispute for $900,000. In the meantime the plaintiffs have also filed an affidavit annexing a letter from Messrs. Hoe & Ahmad Zaki, advocates and solicitors dated April 27, 1981 which informs of an offer to purchase the land in dispute at the total price of $950,000. The said letter (Encl. 27) states:—

"We act for Syarikat Perubatan Utara Sdn. Bhd. and we have been instructed to make you an offer to purchase land belonging to the estate of Tengku Md. Jewa deceased comprised in SPK. 20740 Lot 2414, Mk. Kota Star at the total purchase price of $950,000 (Nine Hundred Fifty Thousand) only subject to terms of a formal contract to be agreed upon by both parties."

These offers were made subsequent to that of the objector. In the light of the above the first question that arises is whether leave should be granted to the applicants for the sale of the land in dispute to the purchasers.

The accepted principles adopted by the courts in cases where administrators apply for leave to sell, having executed a conditional contract subject to the leave of the court with purchasers and a beneficiary objecting to the contract thereof produces a higher offer is a *prima facie* duty to see that the estate benefits as much as possible. It is not for the court to consider the interests of the purchaser who is well aware of the risks he runs in entering into a conditional contract. The duty of the court is to protect the rights of those interested in the property and it is immaterial that at the time the offer was made the price was a reasonable one. That was held by the Court of Appeal in *Che Ah and Che Yang Kelsom* v. *Che Ahmad.*[1] In that case the administrator of an estate applied for leave to sell certain land which he had verbally agreed to sell at a certain price subject to the approval of the court. Two of the beneficiaries of the estate brought to the notice of the court that their solicitors had received a higher offer for the land. The learned trial judge approved the conditional contract being satisfied that at the time

the offer was a reasonable one. It was held that the learned judge applied the wrong principle. On page 106 Terrel J.A. said:—

"In all these cases the duty of the court is to protect the rights of the parties who have an interest in the property to be sold, and it is a matter for the discretion of the judge whether the sale should be by public auction or whether the court is satisfied that, in a private sale, the highest price can be obtained. Where in an application under the Federated Malay States procedure all the beneficiaries are *sui juris* and have consented the court will be entitled to assume that the price offered is the best obtainable."

In *Haji Saud* v. *Haji Ahmad & Anor.*[2] the Court of Appeal held in a similar case that an administrator can enter into an agreement for the sale of immovable property but the agreement is unenforceable unless the permission of the court is obtained.

The first case cited is distinguishable from *Ng Lit Cheng* v. *Felixia Varnakulasinghe & Anor.*[3] In that case the High Court granted leave to the administrator to sell the land, the only property of the estate, to the appellant and the majority of the beneficiaries had agreed to the sale after the order for sale had been passed and perfected an offer of a higher price was made. The Federal Court held that the trial judge erred in setting aside the order which he had already made. On page 253 Gill C.J. (as he then was) said:—

"There must be a clear distinction between the position of a potential purchaser from the estate of a intestate deceased whose contract can only be conditional until the court approves the sale and the position of the purchaser whose contract has already been confirmed by a court order."

It was also held that the offer of a much higher price after the order for sale had been passed and perfected was wholly irrelevant.

Similarly in the case of *Buttle & Ors.* v. *Saunders & Anor.*[4] the Court of the Chancery Division held the trustees and their solicitors acted on an incorrect principle in considering that having gone so far in their negotiations with the original purchaser they could not, from the point of view of commercial morality, probe the subsequent higher offer. It was also held that the trustees had an overriding duty to obtain the best price in the sale of the trust properties for their beneficiaries.

Turning to the present case it is clear that the plaintiffs are not bound by the agreement executed with the purchasers unless leave is granted by this court. In the light of the authorities and principles discussed above and in view of the higher offers made, I have no alternative but to refuse granting leave in approving the conditional contract, even if the offer of $830,000 at the material time was a reasonable one. In fact it cannot be said to be reasonable in view of the objector's higher offer. As between the two the latter should stand in a better position since apart from being the beneficiary holding the highest share in the estate she has offered a higher price well before the conditional contract. She has also shown genuine interest, willingness and ability to purchase the land in dispute with a view to retaining it with at least one of the members of the deceased's family in accordance with her late father's wishes. Her reason may be sentimental but a natural one.

Be that as it may, I feel it is my duty to protect the rights of all the beneficiaries who are interested in the land to be sold and consider the highest offer at the moment being $950,000 i.e. $100,000 more than what the objector has offered. The learned counsel for the plaintiffs submitted that in the circumstances the order of sale by tender as in the case of the other properties is the most appropriate way. In *Che Ah and Che Yang Kelsom* v. *Che Ahmad* (*supra*) and *In re Thomas, Bartley* v. *Thomas*[5] at the request of counsel the property was ordered to be put up for public auction on an undertaking from the person offering the higher price that he would start bidding at the price. I do not think that similar order by auction should be made in this case, but I agree with respect that the land in dispute should be sold by way of tender in order to obtain the best price possible. In this way both the purchasers and the objector will have a chance to submit their tender. The plaintiffs under this order may take out a summons under Order 31 rule 2(2) R.H.C. 1980 to proceed with the said order and obtain further direction from this court under rule 2 subsection (4).

I order that the costs of this summons be paid out of the assets of the estate.

By request I also order the sum of $12,260 now deposited in court be utilised for the expenses to be incurred in calling for tenders etc.

Order accordingly.

Solicitors: *Nik Saghir, Dr. Yaacob & Ismail; S. Visvanathan; Lim Teong Chuan & Co.*

AMPAT TIN DREDGING LTD. v. DIRECTOR GENERAL OF INLAND REVENUE

[A.C.J. (Mohamed Azmi J.) October 2, 1981]
[Kuala Lumpur — Originating Motion No. 9 of 1976]

Revenue Law — Income Tax — Deduction — Retrenchment benefits paid due to closure of mine — Whether outgoings and expenses wholly and exclusively incurred in the production of gross income — Interpretation of taxing statute — Income Tax Act, 1967, s. 33(1).

In this case the appellant was a tin mining company which had gone into liquidation because of the exhaustion of its tin ore reserve. Payment of retrenchment benefits were made to various employees in accordance with the terms of two agreements made between the Malayan Mining Employers' Association, of which the appellant was a member and two trade unions representing the employees. The agreements *inter alia* provided for retrenchment benefit if an employee is retrenched due to the closure of a mine. The appellant claimed to deduct the payments of retrenchment benefits as being "outgoings and expenses wholly and exclusively incurred in the production of gross income" within the meaning of section 33(1) of the Income Tax Act, 1967. The Special Commissioners disallowed the deductions on the ground that the sums were paid not in order to produce income but because the taxpayer was going out of business. The appellant appealed by way of case stated to the High Court.

Held: (1) the onus of proof in this case was on the appellant to show that the payments were outgoings and expenses wholly and exclusively incurred in the production of gross income;

(2) the money expended on retrenchment benefits to the company's employees before winding up its business could not possibly be said to have been "wholly and exclusively incurred in the production of the gross income" within the ambit of section 33(1) of the Income Tax Act, 1967;